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Statutes and General Provisions

Constitution of Nicaragua

Art. 38 (In original Spanish):

La ley no tiene efecto retroactivo, excepto en materia penal cuando favorezca al reo.

Art. 38 (In English translation):

The law does not have retroactive effect, except in criminal matters when it favors the accused.

Art. 138(2) (In original Spanish):

Son atribuciones de la Asamblea Nacional . . . la interpreción auténtica de la ley.

Art. 138(2) (In English translation):

The functions of the National Assembly are . . . to officially interpret the law.

Art. 165 (In original Spanish):

Los Magistrados y Jueces en su actividad judicial, son independientes y sólo deben obediencia a la Constitución y a la ley[.]

Art. 165 (In English translation):

Magistrates and judges, in their judicial capacity are independent and should only obey the Constitution and the law[.]

Art. 182 (In original Spanish):

La Constitución Polítca es la carta fundamental de la República; las demás leyes están subordinadas a ella. No tendrán valor alguno las leyes, tratados, órdenes o disposiciones que se opongan o alteren sus disposiciones.

Art. 182 (In English translation):

The Political Constitution is the fundamental document of the Republic; all other laws are subordinated to the Constitution. Laws, treaties, orders or dispositions which are opposed to the Constitution or alter its provisions shall not have any effect.

Code of Civil Procedure of Nicaragua

Art. 194 (In original Spanish):

Los tribunales y Jueces aplicarán de preferencia:

1. La Constitución
2. Las leyes y decretos legislativos; y
3. Los acuerdos y decretos ejecutivos.

En ningún caso atenderán a disposiciones o reformas hechas en oficio.

Art. 194 (In English translation):

The Tribunals and Judges shall apply in order of preference:

1. The Constitution
2. Legislative laws and decrees;
3. Executive agreements and decrees.

In no case may they rely on provisions or reforms made ex officio.

Civil Code of Nicaragua

§ III, Título Preliminar, Interpretación de la ley,
XVI (In original Spanish):

Al aplicar la ley, no puede atrubuírsele otro sentido que el que resulta explícitamente de los términos empleados, dada la relación que entre los mismos debe existir y la intención del legislador.

§ III, Preliminary Title, Interpretation of the law, XVI (In English translation):

In applying the law, there cannot be attributed any meaning other than that which results explicity from the terms used, given the relationship which should exist between them and the intention of the legislator.

Art. 1835 (In original Spanish):

Las obligaciones derivadas de la ley no se presumen. Sólo son exigibles las expresamente determinadas en este Código o en las leyes especiales, y se regirán por los preceptos de la ley que las hubiere establecido, y en los que ésta no hubiere previsto, por las disposiciones del presente Libro.

Art. 1835 (In English translation):

The obligations derived from the law are not presumed. Claims can only be based on those obligations expressly provided for in this Code or in the special laws, and they shall be governed by the precepts of the legislation that established them and, with respect to matters that the legislation did not provide for, by the dispositions of this present book.

Art. 2509 (In original Spanish):

Todo aquel que por dolo, falta, negligencia o imprudencia o por un hecho malicioso causa a otro un daño está obligado a repararlo junto con los perjuicios.

Art. 2509 (In English translation):

Everyone who by intentional misconduct, fault, negligence or imprudence or by a malicious act causes injury to another is obligated to repair it along with the harms.

Penal Code of Nicaragua

Art. 46 (In original Spanish):

La indemnización de perjuicios se hará determinando prudencialmente el Tribunal, a falta de prueba, el valor del perjuicio material o moral originado por el hecho punible y

especialmente el perjuicio causado en la industria o negocio, en la vida, salud, honra o reputación del ofendido.

Art. 46 (In English translation):

The indemnification of damages shall be made prudentially by the court, if there is lack of proof, by determining the value of the pecuniary or moral damage caused by the punishable act and especially the damage caused in the industry or business, life, health or reputation of the victim.

Art. 52 (In original Spanish):

Todas las gestiones para la indeminzación de daños y perjuicios o reparación del daño causado, se ventilarán en juicio civil, una vez ejecutoriada la sentencia que en lo criminal declare la responsabilidad del culpable para tales indemnizaciones o reparaciones, ...

Art. 52 (In English translation):

All requests for the indemnification of damages or reparation of the harm caused shall be made in the civil trial, once the judgment of the criminal trial has been enforced, declaring the liability of the guilty person for such damages. . . .

Art. 76 (In original Spanish):

Nadie puede ser juzgado dos veces por el mismo delito.

Art. 76 (In English translation):

No one shall be tried twice for the same offense.

PROCURADURIA GENERAL DE JUSTICIA

C O N S T A N C I A

CARLOS HERNANDEZ LOPEZ, Procurador General de Justicia de la República de Nicaragua, nombrado el día 10 de Enero de 1994 por la Excelentísima Presidenta de Nicaragua, Señora Violeta Barrios de Chamorro, HACE CONSTAR: Que, dentro del lapso de tiempo transcurrido desde su nombramiento, no ha otorgado autorización a ningún Abogado, Bufete de Abogados, Instituciones u Organismos Estatales o no Estatales, personas naturales o jurídicas, que tengan su domicilio o residencia dentro o fuera de Nicaragua, para que en nombre y representación de la Procuraduría General de Justicia de la República de Nicaragua, en forma separada o conjunta, elaboren ninguna clase de alegato "**Amicus Curiae**", ni ninguna otra clase de alegato, para ser presentado o gestionada su admisión, en alguna Corte de los Estados Unidos de América, con motivo del accidente de aviación de TAN-SAHSA ocurrido el día 21 de Octubre de 1989 en la República de Honduras, Centroamérica.

A solicitud de parte interesada y para los efectos de ley, se extiende el presente documento en la ciudad de Managua, Nicaragua, a los dieciseis días del mes de Mayo de Mil Novecientos Noventa y Cuatro.

/s/ CARLOS HERNANDEZ LOPEZ
CARLOS HERNANDEZ LOPEZ
Procurador General de Justicia

[Procuraduria General de Justicia
Republica de Nicaragua
Republica de Nicaragua,
America Central]

Ministerio de Relaciones Exteriores
Dirección General Consular
Managua, Nicaragua

El Ministerio de Relaciones Exteriores de la Republica de Nicaragua "Certifica" que la Firma que antecede y dice: CARLOS HERNANDEZ LOPEZ.

"Es Auténtica y corresponde" a la que a la fecha usa (ba), PROCURADOR GENERAL DE JUSTICIA DE LA REPUBLICA DE NICARAGUA.

Este Ministerio no asume responsabilidad en cuanto al contenido del documento.
Managua 17 de Mayo de 1994.

[Ministerio de Relaciones Exteriores
Republica de Nicaragua
Managua, Nicaragua
America Central]

THELMA PREGO FERNANDEZ
Director
Dirección General Consular

/s/ BERGMAN ZÚNIGA PÉREZ
BERGMAN ZÚNIGA PÉREZ
Sub Director General
Dirección General Consular

REPUBLIC OF NICARAGUA
CITY OF MANAGUA
EMBASSY OF THE UNITED
STATES OF AMERICA

I CERTIFY THAT THE OFFICIAL NAMED BELOW, WHOSE TRUE SIGNATURE AND OFFICIAL SEAL ARE RESPECTIVELY SUBSCRIBED AND AFFIXED TO THE ANNEXED DOCUMENT, WAS ON THIS DAY, EMPOWERED TO ACT IN THE OFFICIAL CAPACITY DESIGNATED IN THE ANNEXED DOCUMENT, TO WHICH FAITH AND CREDIT ARE DUE.

THELMA PREGO FERNANDEZ

/s/ JANE GRAY
JANE GRAY
Consul
18 May 1994

TRANSLATION

[SEAL]
ATTORNEY GENERAL'S OFFICE

CERTIFICATE

CARLOS HERNANDEZ LOPEZ, Attorney General of the Republic of Nicaragua, appointed on January 10, 1994, by the Hon. President of Nicaragua, Mrs. Violeta Barrios de Chamorro, CERTIFIES: That during the period of time elapsed since his appointment, he has not conferred authorization to any Lawyer, Lawyers' Office, Government or Non-Government Institutions or Agencies, natural or juristic persons having their domicile or residence either within Nicaragua or without, to prepare, either jointly or severally, on behalf and in representation of the Attorney General's Office of the Republic of Nicaragua, any type of *amicus curiae* brief or any other type of brief to be submitted to any Court of the United States of America, or to take any steps aimed at the admission thereof in any Court of the United States of America, in connection with TAN-SAHSA's aircraft accident which occurred on October 21, 1989, in the Republic of Honduras, Central America.

I hereby issue these presents, at the request of the interested party and for all legal purposes, in the city of Managua, Nicaragua, this sixteenth day of May one thousand nine hundred ninety-four.

(Signed)
CARLOS HERNANDEZ LOPEZ
Attorney General
[AFFIXED SEAL READS:
ATTORNEY GENERAL'S OFFICE
REPUBLIC OF NICARAGUA
REPUBLIC OF NICARAGUA, CENTRAL AMERICA]

TRANSLATION

MINISTRY OF FOREIGN AFFAIRS
GENERAL CONSULAR OFFICE
MANAGUA, NICARAGUA

The Ministry of Foreign Affairs of the Republic of Nicaragua "CERTIFIES" that the foregoing Signature, which reads: CARLOS HERNANDEZ LOPEZ, "is an authentic Signature and corresponds" to the hand being set to date/to the hand which used to be set to date by the ATTORNEY GENERAL OF THE REPUBLIC OF NICARAGUA.

This Ministry does not assume any liability regarding the contents of the document.

Managua, this 17th day of May, 1994.

Thelma Prego Fernández
Director
General Consular Office

(Signed) Bergman Zúniga
BERGMAN ZÚNIGA PEREZ
DEPUTY GENERAL DIRECTOR
GENERAL CONSULAR OFFICE

[SEAL AFFIXED TO THE TEXT READS:
MINISTRY OF FOREIGN AFFAIRS—
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STATE OF NEW YORK)
ss:
COUNTY OF NEW YORK)

ISOLINA BERNHARDT, being duly sworn, deposes and says:

1. I am a federally Certified Court Interpreter pursuant to oral and written examinations given by the Administrative Office of the United States Courts, and I am also accredited with the American Translators Association to translate from Spanish into English and from English into Spanish.

2. I hereby certify that I have translated into English the Certificates issued in Managua, Nicaragua, on May 16, 1994, and May 17, 1994, respectively, to the best of my knowledge and ability.

/s/ ISOLINA BERNHARDT
Isolina Bernhardt
Certified Court Interpreter

Sworn to before me this
25th day of May, 1994.

/s/ MARY ANN ROONEY
NOTARY PUBLIC

MARY ANN ROONEY
NOTARY PUBLIC, State of New York
No. 31-4672706
Qualified in New York County
Commission Expires May 31, 1994

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

CASE NOS. 92-1408 & 92-925
(CONSOLIDATED)

TRANSPORTES AEREOS NACIONALES, S.A., a foreign corporation, and SERVICIO AEREO DE HONDURAS, S.A., a foreign corporation,

Defendants-Appellants,

—v.—

TANIA FLORES DE BRENES, individually and as Executor, Administrator, or Personal Representative of the Estate of ERICK ANTONIO BRENES, Decedent, for herself and on behalf of the Decedent's survivors, and CLAUDIA CROW, for herself and as Executor, Administrator, or Personal Representative of the Estate of ALFONSO G. WONG-VALLE and MARIA WONG-VALLE, decedents, et al.,

Plaintiffs-Appellees.

APPELLANTS' REPLY TO MOTION FOR REHEARING

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PRELIMINARY STATEMENT

Unsuccessful in their attempted use of a "consulta" to influence this Court, plaintiffs now introduce *post hoc* legislation, enacted "in response" to this Court's March 8, 1993 decision, which completely changes Nicaraguan moral damage law. Plaintiffs' bold attempt to seek the retroactive application of this new law makes a mockery of this Court and Florida's entire judicial system.[1] Plaintiffs' effort, however, is to no avail because Article 38 of the Nicaraguan Constitution provides that "the law does not have retroactive effect, except in criminal matters when it favors the accused." Constitución Polítca de Nicaragua [Nicar. Const.], Art. 38. Florida and federal law also preclude the retroactive application of any new legislation affecting substantive rights. *Anderson v. Anderson*, 468 So.2d 528, 530-31 (Fla. 3d DCA), *rev. denied*, 476 So.2d 672 (Fla. 1985).

The retroactive application of plaintiffs' new law making moral damages available in all civil cases also would violate TAN-SAHSA's due process rights under the Florida and United States Constitutions. Accordingly, plaintiffs' Motion for Rehearing should be denied because the Court's decision did not overlook or misapprehend applicable Nicaraguan law as it existed prior to the enactment of this new legislation.

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[1] Like its predecessor the "consulta", new Law No. 157 reads like a Spanish nutshell version of plaintiffs' brief. The timing and substance of the "consulta" no longer appear coincidental. Indeed, plaintiffs admit that Law No. 157 was passed by the Nicaraguan Assembly "in response to the Panel's opinion." Plaintiffs' Motion for Rehearing at 1, 3. It is difficult to imagine that the Nicaraguan Assembly would have completely overhauled Nicaraguan law on moral damages within the time necessary for plaintiffs to file their Motion for Rehearing without the active involvement of plaintiffs or their agents.

I

RETROACTIVE APPLICATION OF LAW NO. 157 WOULD VIOLATE THE NICARAGUAN CONSTITUTION, FLORIDA LAW AND TAN-SAHSA'S DUE PROCESS RIGHTS

A. The Nicaraguan Constitution Strictly Precludes Retroactive Application of Laws

The centerpiece of plaintiffs' Motion for Rehearing is Law No. 157, *post hoc* legislation passed by the Nicaraguan Assembly on March 23, 1993 "in response" to the Court's decision in this case. Contrary to what plaintiffs would have this Court believe, Law No. 157 cannot be treated as some intervening appellate court decision in a common law jurisdiction. The Nicaraguan Legislature can only act by passing laws. Law No. 157, therefore, can only be treated as new legislation altering substantive rights.

The Nicaraguan Constitution makes no distinction between laws which purport to interpret and laws which modify and specifically forbids retroactive application of any law except in certain criminal matters. Article 38 of the Nicaraguan Constitution expressly provides:

> The law does not have retroactive effect, except in criminal matters when it favors the accused.

(App. 3).[2] Article 182 of the Nicaraguan Constitution provides that the Constitution is the supreme law of the land.

> The Political Constitution is the fundamental document of the Republic; all other laws are subordinated to the

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[2] In Spanish:

> La ley no tiene efecto retroactivo, excepto en materia penal cuando favorezca al reo.

(App. 2). Nicaragua's prohibition against retroactive application of law is consistent with the general practice in civil law countries. *See generally* John Henry Merryman, *The Civil Law Tradition* 77 (1969) (noting the civil law "rule against retroactivity").

> Constitution. Laws, treaties, orders or dispositions which are opposed to the Constitution or alter its provisions shall not have any effect.

(App. 5).[3] *See also* Article 194 of the Nicaraguan Code of Civil Procedure (providing that tribunals and judges shall apply, in order of preference, (1) the Constitution, (2) Legislative laws and decrees, and (3) Executive agreements and decrees). Plaintiffs fail to cite any Nicaraguan law or legal principle to support their argument that new Law No. 157 should be applied retroactively.

Because the Nicaraguan Constitution mandates that laws shall not have retroactive effect, Law No. 157, passed by the National Assembly only 15 days after this Court's decision and "in response" thereto, cannot be applied retroactively to circumvent the authority and integrity of this Court and the Florida judicial system.

B. Law No. 157 Changes Substantive Nicaraguan Law and Alters the Substantial Rights of the Parties

It cannot be disputed that Law No. 157 is a blatant attempt to transform Nicaraguan tort law on the question of moral damages for the sole purpose of circumventing this Court's March 8, 1993 decision. The current Nicaraguan Assembly cannot possibly know what the 1904 Assembly intended when it enacted the Civil Code. Accordingly, Law No. 157 is not an interpretive law at all but rather new legislation enacted in a civil law jurisdiction which alters substantive rights. As such, Law No. 157 cannot be applied retroactively to overturn this Court's March 8, 1993 decision.

Although the general rule is that "disposition of a case on appeal is made in accordance with the law in effect at the time

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[3] In Spanish:

> La Constitución Polítca es la carta fundamental de la República; las demas leyes están subordinadas a ella. No tendrán valor alguno las leyes, tratados, órdenes disposiciones que se le opongan o alteren sus disposiciones.

(App. 4).

of the appellate court's decision, . . . this rule is not applicable when a substantive right is altered." *State v. Lavazzoli*, 434 So.2d 321, 323 (Fla. 1983). For the first time in the history of Nicaragua, Law No. 157 creates a civil remedy for moral damages under Article 2509 of the Civil Code. Contrary to its clever and self-serving title, Law No. 157 is not an "authentic interpretation" of the law but a complete transformation of the law which affects the substantive rights of the parties. In *López Cerna v. Palacios Rodas*, June 11, 1952, Corte Suprema de Justicia, Nicar., Bol. Jud. 16053, 16055, the Nicaraguan Supreme Court stated:

> [A] law of interpretation cannot make distinctions which are extraneous to the essential rights which the original law establishes without distorting its basic nature and becoming a modifying law . . . .

(App. 15).[4] Under Nicaraguan law, therefore, the so-called "authentic interpretation" of Law No. 157 is in fact a modification of the law altering essential rights.

Law No. 157 modifies the "substantive" law because "it gives to a party who did not have [it] the legal right to recover substance [moral damages] from a party who did not theretofore have the legal obligation to render or pay that money." *L. Ross, Inc. v. R. W. Roberts Construction Co.*, 466 So.2d 1096, 1098 (Fla. 5th DCA 1985), *aff'd*, 481 So.2d 484 (Fla. 1986). As the Florida Supreme Court held in *L. Ross, Inc.*, " 'it cannot be reasoned that a statutory change that affects and changes the measure of damages is merely "remedial" and thus, procedural, and, therefore, is not a change in the substantive law giving the substantive right which is the basis for the damages.' " 481 So.2d at 485. *See also Haven Federal Savings & Loan Ass'n v. Kirian*, 579 So.2d 730, 732

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[4] In Spanish:

> [u]na ley aclaratoria no puede hacer distinciones extrañas a lo esencial que establece la original, sin desvirtuar su propio carácter, para convertirse en modificatoria . . . .

(App. 9).

(Fla. 1991) ("Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer. It includes those rules and principles which fix and declare the primary rights of individuals with respect to their persons and property.").

C. Florida and Federal law Preclude the Retroactive Application of Legislation Affecting Substantive Rights

Florida and federal law also prohibit retroactive application of Law No. 157.[5] "It is a well-established rule of construction that in the absence of clear legislative expression to the contrary, a law is presumed to operate prospectively." *State v. Lavazzoli*, 434 So.2d 321, 323 (Fla. 1983). Nothing in Law No. 157 provides for its retroactive application. Indeed, the new law expressly provides that it will take effect *upon publication* "by any means of mass communication." *Ley No. 157, El Nuevo Diario*, March 26, 1993, at 10. (App. 20, 23). *See State Dept. of Revenue v. Zuckerman-Vernon Corp.*, 354 So.2d 353, 358 (Fla. 1977) (legislature's "inclusion of an effective date . . . rebuts any argument that retroactive application of the law was intended"); *Automobile Ins. Co. of Hartford v. Beem*, 469 So.2d 138, 141 (Fla. 3d DCA 1985)

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[5] In enacting Law No. 157 "in response" to the Court's decision in this case, the Nicaraguan National Assembly presumably was influenced by the *ex parte* lobbying and drafting efforts on behalf of these Nicaraguan plaintiffs who seek to recover *additional* compensation by way of moral damages from the Honduran defendant in this case. If this Court retroactively applies the hastily enacted Law No. 157 to the case at bar, once that decision becomes final and the Nicaraguan plaintiffs are paid their moral damages, the Assembly can just as hastily repeal Law No. 157 to protect Nicaraguan defendants from such damages. Clearly, one of the reasons why the strict rule against retroactive application of legislative enactments is recognized, not only in Nicaragua but in every jurisdiction in the United States, is to prevent this type of manipulation of the law by politicians. *See, e.g.*, 73 Am. Jur. 2d, *Statutes* 350 (1974) ("[C]ourts observe a strict rule of construction against a retrospective operation [of statutes].")

(statute's effective date "is an expressed legislative intent that application of [the] law be prospective").

This Court correctly ruled that Article 2509 of the Nicaraguan Civil Code did not provide for an award of moral damages and correctly based its decision on the language of the Code and its prior legislative history. Law No. 157, a subsequent "modifying law," cannot be applied to overrule this Court's decision on an *ex post facto* basis.

In *Kaisner v. Kolb*, 543 So.2d 732, 738 (Fla. 1989), the Florida Supreme Court, in refusing to apply a statutory amendment which the Legislature specified should be retroactive, stated:

> Subsequent legislatures, in the guise of "clarification," cannot nullify retroactively what a prior legislature clearly intended.

Similarly, in *Fletcher v. Housing Authority of Louisville*, 525 F.2d 532, 535 (6th Cir. 1975), the court stated:

> Legislative action cannot, however, change *ex post facto* what was the intent of prior legislation. Judicial review . . . would be meaningless if we were to allow a losing party to secure statements from a legislature that the courts had misinterpreted the intent of a prior legislature and then to force a reversal of the judicial result based on such an *ex post facto* basis.

Accordingly, both Florida and federal law dictate that Law No. 157 may not be applied retroactively to alter the substantive rights of the parties to this appeal.

D. Retroactive Application of Law No. 157 Would Violate TAN-SAHSA's Due Process Rights Under the United States and Florida Constitutions

Retroactive application of Law No. 157 to this case would violate TAN-SAHSA's due process rights under the Florida and United States Constitutions because "damages and penalties . . . for which [a party] may be held liable cannot be

constitutionally enlarged after the date of the alleged [wrongful act]." *Florida Patient's Compensation Fund v. Scherer*, 558 So.2d 411, 414 (Fla. 1990) (holding that attorney fee statute for medical malpractice actions could not be constitutionally applied to action arising out of injury which incurred before effective date of statute). Citizens "cannot be charged reasonably with notice of the consequences of impending legislation before the effective date of that legislation, for it is generally accepted that a statute speaks from the time it goes into effect." *Dewberry v. Auto-Owners Ins. Co.*, 363 So.2d 1077, 1080 (Fla. 1978). Because Law No. 157 alters TAN-SAHSA's substantive rights under Nicaraguan law, the new legislation cannot be applied retroactively without violating TAN-SAHSA's due process rights under the Florida and United States Constitutions. *L. Ross, Inc. v. R. W. Roberts Construction Co.*, 466 So.2d 1096, 1098-99 (Fla. 5th DCA 1985), *aff'd*, 481 So.2d 484 (Fla. 1986) (retroactive application of a statutory change that increases measure of damages would violate defendant's due process rights).

II

NO CONFLICT EXISTS BETWEEN THE COURT'S DECISION AND *GUELMAN*

[Discussion omitted]

III

PLAINTIFFS' MOTION FOR REHEARING IMPROPERLY REARGUES THE MERITS

[Discussion omitted]

CONCLUSION

Plaintiffs' Motion for Rehearing should be denied in all respects. Retroactive application of Law No. 157 would violate the mandate of the Nicaraguan Constitution, established Florida and federal law and TAN-SAHSA's due process rights under the United States and Florida Constitutions.

Respectfully submitted,

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